FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

1675

December 7, 2011

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Genachowski:

Your recent decision to release a staff analysis pertaining to the withdrawn AT&T / T-Mobile filing and apparently to revise the FCC's "spectrum screen" in that document touches upon FCC process issues the Committee on Energy and Commerce has been focusing on this year. Throughout the 112th Congress, the Subcommittee on Communications and Technology has taken a hard look at the processes of the Federal Communications Commission (FCC) to ensure that the Commission maintains the highest standard of transparency and predictability in the exercise of its duties. We therefore request additional information on how you decide whether to release staff analyses or other materials surrounding withdrawn items and how the FCC uses the "spectrum screen" process in reviewing the spectrum holdings of FCC licensees.

Prior to 2003, the FCC imposed a spectrum cap that precluded a wireless carrier from holding more than 55 MHz of spectrum in any geographic area of the United States. The FCC adopted this spectrum cap through its rulemaking process, and eliminated the cap in the same manner.

Beginning in 2003, the FCC replaced the spectrum cap with the so-called spectrum screen. The FCC has used the spectrum screen on a case-by-case basis to identify markets in which there is no potential for competitive harm presented by the transfer of control of licenses for mobile services. For markets in which the screen is exceeded, the FCC then conducts a more granular review to determine whether a transaction would, in fact, impose any such harm. During the past nine years, the FCC has increased the amount of spectrum available to provide mobile services, both through auction of additional spectrum as well as through more flexible use of existing commercial spectrum. However, because the spectrum screen is applied on a case-by-case basis during transactions, it is not entirely clear whether and how the FCC conducts an analysis of the marketplace to establish the spectrum screen, nor precisely how it uses that

screen in review of a transaction. The FCC has never adopted formal rules or process to govern the setting and use of the spectrum screen, which has resulted in uncertainty as to the FCC's process, reasoning, and rationale.

The FCC apparently changed its spectrum screen in the recently released staff analysis on the AT&T / T-Mobile transaction, a document that was not adopted by the FCC. Moreover, questions remain as to how the Commission uses the spectrum screen. Traditionally, the use of the screen has mirrored the way in which the Department of Justice looks at the Herfindahl-Hirschman Index (HHI): a high or increased HHI is not itself an indication of lack of competition, rather it is used to identify those markets that require additional scrutiny. Recent FCC actions seem to indicate that the Commission intends to use the spectrum screen as an indication of *de facto* lack of competition.

We therefore ask that you provide answers to the following questions:

1. Why did you decide to release the staff analysis? What process did you follow in making that decision? Is such a decision solely within the discretion of the Chairman or does it require consent of the other Commissioners? Did you consult with them? Or was this decision made by the staff?

2. Has the FCC ever previously released underlying materials related to a withdrawn license transaction or other pending item, such as a Section 271 application or forbearance petition? If so, what were the circumstances?

3. Has the FCC ever previously released underlying materials related to a withdrawn item that discusses another item still pending before the Commission or staff?

4. Has the FCC ever previously chosen not to release underlying materials related to a withdrawn license transaction or other pending item, such as a Section 271 application or forbearance petition? If so, what were the circumstances?

5. What factors does the FCC consider when deciding whether to release materials relating to a withdrawn item? Does the FCC have formalized rules regarding such a decision to release materials?

6. How much advance notice of changes to the spectrum screen is the public provided so that they may factor it into their analysis of proposed or potential transactions?

7. Are *ad hoc* changes to the spectrum screen customary? If so, why are such changes appropriate both as a matter of law and as a matter of good policy without a full notice and comment rulemaking providing the public and interested parties an opportunity to provide input?

8. Has the FCC sought notice and comment on the spectrum screen process?

9. What factors does the FCC include when formulating a spectrum screen?

10. Does the spectrum screen treat all spectrum the same? If not, how and why does it treat some spectrum differently?

11. How does the FCC account for the evolution of the spectrum screen as market conditions change?

12. How does the FCC use the spectrum screen: as an indication that further competitive analysis is needed or as the basis for a finding that competitive harm exists in that market?

Please provide your responses by December 19, 2011. If you have any questions please contact Neil Fried or David Redl of Committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

Greg Walden
Chairman
Subcommittee on Communications
and Technology

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Anna G. Eshoo, Ranking Member
Subcommittee on Communications and Technology

Committee on Energy and Commerce
U.S. House of Representatives
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To:	Ms. Terri Glaze, Director of Legislative Affairs, Federal Communications Commission for Chairman Julius Genachowski, Federal Communications Commission
From:	Rep. Fred Upton, Chairman, Committee on Energy and Commerce Rep. Greg Walden; Chairman, Subcommittee on Communications and Technology
Fax:	(202) 418-2806
Date:	December 7, 2011
Phone:	
Pages:	4 (Including cover)
Notes:	

FEDERAL COMMUNICATIONS COMMISSION

JULIUS GENACHOWSKI
CHAIRMAN

December 20, 2011

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Upton:

This responds to your letter of December 7, 2011, concerning the Commission's review of AT&T's proposed acquisition of T-Mobile. I appreciate your interest in the transparency and predictability of Commission proceedings. As part of our reform agenda, the Commission has put significant emphasis on opening up Commission processes and increasing predictability for the industries within our jurisdiction. We have made great progress to date, and will continue to focus on unleashing innovation, investment, and job creation, and promoting competition.

As you are aware, on Tuesday, November 22, consistent with our statutory obligations under the Communications Act and following an extensive staff review, I circulated to my colleagues a draft order that would have referred AT&T's proposed acquisition of T-Mobile to a hearing before an Administrative Law Judge. Due to the voluminous record and complicated issues in this matter, prior to circulation of the draft hearing designation order ("HDO"), the Commission staff had prepared a report – titled "Staff Findings and Analysis" – with the intention that the report would be appended to and published with the Commission's HDO.

Shortly after my staff and I notified AT&T and Deutsche Telekom of the decision to circulate, the Applicants announced that, while they were continuing to pursue antitrust clearance from the Department of Justice and still sought FCC approval to close their proposed deal, they were seeking to withdraw their license transfer applications from consideration by the Commission. To the best of our knowledge, this was an unprecedented action. My staff and I are unaware of any other case in which parties have sought to withdraw license transfer applications following the circulation of a proposed Commission decision while continuing to pursue the same transaction.

Following AT&T's and Deutsche Telekom's announcement, my staff and I consulted with each of my fellow Commissioners and their staffs about granting the Applicants' request to withdraw and making the staff report publicly available. AT&T's

and Deutsche Telekom's request to withdraw their applications was subsequently granted and the staff report was released.

As we explained at the time, there were strong reasons to release the report. AT&T and Deutsche Telekom filed their applications with the Commission knowing that doing so would trigger a significant transaction review process that would consume substantial public and private resources. The Commission received 50 petitions to deny the transaction and extensive public comment from businesses, public interest groups, and other interested third parties. The staff conducted hundreds of meetings and reviewed and analyzed hundreds of thousands of pages of documents, data, and other submissions from the Applicants and third parties.

Based on this substantial record, Commission staff prepared a detailed report for public release synthesizing and analyzing the extensive arguments and factual submissions made in the record by the Applicants and numerous participants. Releasing the report promoted fairness and transparency to the public, the participants in the proceeding, and all interested parties. Furthermore, given the Applicants' public statement that they were not abandoning the transaction and indeed planned to return to the FCC for approval, the report contained information of ongoing relevance to the public and all participants in the proceeding, including the Applicants. Lastly, unlike the working draft HDO and other deliberative Commission documents that are not disclosed to the public, the staff report was both final and intended for release.[1]

In view of all of the foregoing, I concluded that it would not be appropriate to suppress the completed report.

With respect to the spectrum screen, since 2003, the Commission has applied a case-by-case analysis, rather than a blanket spectrum cap, when examining the potential competitive impacts of proposed transactions involving the aggregation of spectrum. The Commission developed an initial spectrum screen during its review in 2004 of the Cingular/AT&T Wireless transaction to identify or "trigger" specific markets for further competitive evaluation. It has no actionable effect; it is merely a tool used to narrow the Commission's focus on markets where there may be a higher level of concern. The screen is triggered when a transaction would aggregate more than approximately one-third of the spectrum suitable for the service at issue (e.g., mobile broadband) in a particular market in the hands of one entity.

[1] The confidential HDO that I circulated to my fellow Commissioners on November 22 was not the Commission's final work product and was not intended for release until after a collaborative editing and voting process (which, in the end, was not completed). The staff report, by contrast, was complete when circulated to the Commissioners and, unlike many staff analyses, was intended for public release in that form. The Staff Findings and Analysis is distinct from a draft denial of a Section 271 application or forbearance petition for the same reasons.

As the Commission has consistently stated, in formulating its screen it "considers directly the input market of spectrum that is suitable" for the services at issue.[2]

> Suitability is determined by whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for [the] service [at issue].[3]

Where there are significant changes in the marketplace that affect the practical availability of spectrum, such as new rules, standards adjustments, or an intervening spectrum auction, the Commission adjusts its screen accordingly.

With respect to whether the spectrum screen treats all spectrum the same, in one sense it does and in another it does not. First, the screen does not currently weight the value – i.e., propagation or capacity characteristics – of various spectrum bands despite their obvious differences.[4] Second, with respect to certain spectrum – BRS spectrum, for example – the Commission has found that "specific features associated with [certain] spectrum," such as interference concerns, may result in all or part of that spectrum not being "suitable" for mobile telephony/broadband services. [5]

When the spectrum screen was first utilized in 2004, it was done without a formal rulemaking process. And each adjustment to the original spectrum screen has occurred during the course of a transaction review, where parties have commented on potential changes to the screen. This approach – which relies on case-by-case analysis rather than formal rulemaking – has been consistently applied by the Commission since 2004. It has been widely regarded as sensible because it enables the Commission to use the most current data available to determine what spectrum should be considered in the screen.

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[2] Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17473 ¶ 53 (2008) ("*Verizon Wireless-ALLTEL Order*"). The Commission has looked at suitable spectrum based on the service at issue. For example, in the Cingular-AT&T Wireless transaction, the FCC looked at suitable spectrum used for mobile telephony service only, Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21557-58 ¶ 72 (2004) ("*Cingular-AT&T Wireless Order*"), while in Verizon-ALLTEL, the Commission used the mobile telephony/broadband service market. *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17473 ¶ 53.

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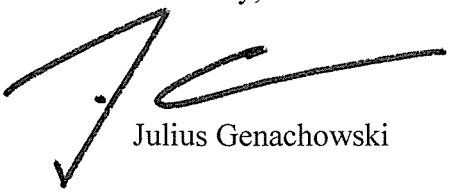
Parties are aware of this and consistently file public comments on the spectrum screen during transaction reviews. This case-by-case approach leads to extensive, timely, and relevant public comment. The alternative risks creating unnecessary process and burdens on interested parties.

This process is well-established and well-understood. Through it, the Commission has updated its screen twice in the last four years.[6] Indeed, AT&T, Deutsche Telekom, and various other stakeholders all asked the Commission to make changes to its spectrum screen within its proceeding on AT&T's proposed acquisition of T-Mobile.[7]

Thank you for taking the time to inquire about these important topics. The Commission will continue to operate in an open and transparent manner in order to serve the American public.

Sincerely,



Julius Genachowski

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CHAIRMAN

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Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
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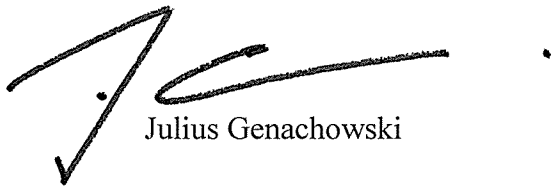

Julius Genachowski

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